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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re JOSEPH P. SHELTON, on Habeas Corpus.	A147754 (Mendocino County Super. Ct. No. SCUKCRCR 15-26673)

Joseph P. Shelton was sentenced to 40 years to life for the brutal kidnapping and murder of two college students. After serving over 30 years in prison, the Board of Parole Hearings (the Board) granted Shelton parole. The Governor subsequently reversed the Board's decision, concluding Shelton posed a current danger because he had minimized his role in the crimes. A few months later, the Ninth Circuit Court of Appeals granted Shelton habeas relief, finding a prosecutor had concealed concerns about the mental competency of Norman Thomas, a key witness in Shelton's criminal trial. Based in part on the Ninth Circuit's opinion, the trial court granted Shelton's petition for a writ of habeas corpus challenging the Governor's parole decision. The trial court found the Governor erroneously relied on Thomas's discredited testimony. The Attorney General now appeals from that decision. We find the Governor's decision was supported by some evidence, even without Thomas's testimony. Accordingly, we reverse.

I. BACKGROUND

A. *The Commitment Offense*[1]

In November 1981, Shelton was convicted of the first degree murder of Kevin Thorpe, the second degree murder of Laura Craig, two counts of kidnapping, two counts of theft, and two weapons charges, and one special circumstance with respect to the Thorpe murder. The jury declined to impose a capital sentence for Thorpe's murder, and the court sentenced Shelton to life without parole on that charge and 15 years to life for Craig's murder, to be served consecutively. After an appeal, the special circumstances were struck and Shelton was resentenced to 40 years to life.

The basic facts of the crime are undisputed. In January 1981, Thorpe and Craig stopped in Madeline, California on their way to college. Shelton, along with Thomas and Benjamin Silva spotted the couple at a gas station and subsequently abducted them. They took Thorpe and Craig to Shelton's cabin outside of the town. Thorpe was chained to a tree, and Craig was held inside the cabin. The day after the abduction, Thorpe was shot to death with a machine gun. Thomas dismembered Thorpe's body, and he and Silva disposed of it in a remote location. Craig was kept in the cabin for several days, and was then shot twice along the side of the road.

Later, Thomas was arrested for a probation violation. He told the police about the murders and directed them to various physical evidence. Shelton turned himself in shortly after learning Thomas had told the police about his involvement in the deaths. Shelton waived his *Miranda*[2] rights, and made a series of partially inculpatory statements to police.

Thomas and Shelton testified at Shelton's trial. Both indicated Silva was the primary instigator, but they offered contrary accounts of Shelton's involvement. Thomas testified Shelton and Silva had discussed kidnapping people prior to the crimes and said that if they did so, they would have to kill them. Shelton initially denied the men had

[1] Our summary of facts of the commitment offense is taken primarily from the Ninth Circuit's opinion in *Shelton v. Marshall* (9th Cir. 2015) 796 F.3d 1075.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

discussed kidnapping and killing people. After the prosecutor confronted Shelton with his statement to the police, Shelton admitted that, a few weeks before the crimes, the men had talked about kidnapping a girl. Shelton also testified that when Silva spotted the victims and proposed the kidnapping, Shelton said he " 'didn't want no part of it.' "

According to Shelton, he and Silva together purchased a spotlight with a red cap, which they used to simulate a police light to stop the victims' vehicle. However, Shelton claimed the light was purchased for an unrelated prank. After stopping the victims' vehicle with the fake police light, Silva and Thomas entered it, abducted the victims at gunpoint, and drove off to Shelton's cabin. Shelton followed the victims' car in a truck. He testified he did not drive away because he was afraid Silva would kill him and his family.

Shelton testified Silva and Thomas chained Thorpe to a tree outside his cabin, and Shelton later gave Thorpe a sleeping bag. Thomas said it was Shelton and Silva who chained Thorpe, and Thomas gave Thorpe the sleeping bag. According to Shelton, the following day, Silva said they needed to move Thorpe because he could be seen from the road. Shelton walked Thorpe up a hill and waited. Shelton said Silva surprised him when he returned with a machine gun and emptied a clip (30 bullets) into Thorpe. Silva fired half of another clip into Thorpe, then gave Shelton the gun and told him to shoot Thorpe. Shelton fired the rest of the clip at Thorpe. Shelton claimed that if he had failed to comply, Silva would have killed him. He denied having prior knowledge of Silva's plan to kill Thorpe.

Thomas gave a different account of Thorpe's murder. Thomas testified Shelton was armed when he went up the hill with Silva and Thorpe. According to Thomas, Shelton later returned and told Thomas to turn on the stereo, and then returned again to turn up the volume, presumably to mask the sound of gunfire. Shelton later informed Thomas he told Thorpe " 'to look at the mountain' " because " 'it was the last thing he would see.' " Thomas testified Shelton laughed as he told him about the murder.

Shelton claimed he tried to protect Craig from Silva after Thorpe's death. According to Shelton, he and Craig left the cabin at one point and ran until Silva caught

them. Shelton also said he talked Silva out of killing Craig at one point, Craig liked him more than Silva and Thomas, and Craig could have left at any time. It was revealed Shelton told police he had consensual sex with Craig, while Silva and Thomas raped her. After several days, Silva left the cabin with Craig and Shelton, purportedly to take Craig to see the head of the Hell's Angels. On the way, Silva stopped the truck to change drivers, but shot Craig as he rounded the vehicle. Shelton testified he did not know Silva intended to kill Craig when they left the cabin. A police investigator testified Shelton told him that, when Craig left the cabin, Shelton was 90 percent sure she would be killed, but believed he could somehow intercede.

B. *The Board's Parole Decision*

In December 2014, Shelton appeared before the Board. He was 62 years old at the time. A psychologist performed a comprehensive risk assessment in connection with the parole hearing, and found Shelton represented a low risk for violence and presented with non-elevated risk relative to life-term inmates and other parolees. During the risk assessment, Shelton told the psychologist drugs impaired his ability to think clearly and contributed to his poor decisions at the time of the commitment offense. He has since attended Narcotics Anonymous, and he no longer has any interest in drinking alcohol or taking drugs. Additionally, Shelton took advantage of various work, vocational training, self-help programs and educational opportunities during his incarceration.

Shelton also discussed his crimes during the risk assessment and parole hearing. He said Thomas was talking with Silva "about females. They wanted to get a woman for sex." Shelton continued: "I should've jumped in and said something. I didn't think they were serious at the time but I later discovered that they were serious." Shelton admitted he could have driven to a police station immediately after the kidnapping, but he feared Silva would kill him, his wife, and his children. Shelton was under the impression Silva was associated with several child deaths. Shelton denied having forcible sex with Craig, saying there was "no rape." He also told the Board he tried to run away with Craig at one point, but she refused to leave and they were eventually caught by Thomas.

The Board granted parole. The commissioners gave special consideration to the fact Shelton qualified for the Elderly Parole Program because he was over the age of 60 and had spent over 25 years in prison. The Board also based its decision on Shelton's lack of violent behavior prior to or after the crime, his acceptance of responsibility, his self-help participation, his educational and vocational achievements, and the psychologist's findings that Shelton had insight into and had accepted responsibility for the crime. Despite finding Shelton's description of the crimes hard to believe, the Board found there was at least "some credibility" to Shelton's statements concerning his fear of Silva and, in any event, the Board could not link Shelton to current dangerousness because of the other factors discussed above.

C. *The Governor Reverses the Board*

In April 2015, the Governor reversed the decision to parole Shelton, stating Shelton's minimization of his involvement in the crimes was extremely troubling. Specifically, the Governor took issue with Shelton's statement he was merely a follower who feared he or his family would be killed if he did not go along with Silva's plan. The Governor was also concerned Shelton denied raping Craig, and by Shelton's claim that he unsuccessfully tried to help Craig escape. The Governor explained: "The record indicates that Mr. Shelton was far from a passive participant in these crimes. Mr. Shelton and the other two men planned to kidnap and rape a woman. Mr. Shelton and the others also discussed killing whoever they kidnapped. He willingly followed his crime partners in his own vehicle to his ranch, where the other crimes took place. Mr. Shelton assisted Mr. Silva in chaining Mr. Thorpe to a tree and later shot Mr. Thorpe several times with a machine gun. . . . He was present when Ms. Craig was murdered and helped dispose of her body. While Mr. Shelton purports to accept responsibility for his actions, his statements minimize his involvement and culpability, and show that he lacks insight into his reasons for kidnapping, raping, and murdering Ms. Craig and Mr. Thorpe."

D. *The Ninth Circuit Grants Shelton Habeas Relief*

In August 2015, about four months after the Governor's reversal of the Board's decision, the Ninth Circuit issued an opinion granting Shelton habeas relief, finding the

prosecutor in Shelton's criminal trial committed *Brady*[3] error by concealing evidence (*Shelton v. Marshall*, *supra*, 796 F.3d at p. 1089), and on a petition for rehearing the court directed the district court to issue a writ ordering the state to retry Shelton for the murder of Thorpe within a reasonable time (*Shelton v. Marshall* (2015) 806 F.3d 1011).[4]

The concealed evidence concerned a secret deal between the prosecutor and Thomas's attorney. (*Shelton v. Marshall*, *supra*, 796 F.3d at p. 1082.) The deal was struck after the prosecutor learned Thomas might be mentally incompetent to stand trial. (*Ibid.*) Worried that evidence of Thomas's mental state would help the defense in Shelton's and Silva's cases, the prosecutor agreed to drop the murder charges against Thomas, and in exchange Thomas's attorney agreed to refrain from having Thomas psychiatrically examined until after he testified against Shelton and Silva.[5] (796 F.3d at p. 1082.)

The Ninth Circuit concluded that had Thomas's testimony against Shelton been excluded as a result of the prosecution's secret efforts to preclude any inquiry into his competency, there was a reasonable probability the jury would not have found Shelton guilty of the first degree murder of Thorpe. (*Shelton v. Marshall*, *supra*, 796 F.3d at pp. 1084–1085.) The court reasoned, "Shelton and Thomas gave very different accounts of Thorpe's murder and Shelton's role in it, with Shelton asserting that he was surprised and even endangered by Silva's actions, while Thomas claimed that Shelton clearly knew what was about to happen to Thorpe and indeed actively and eagerly played a part in it." (*Ibid.*) Moreover, no other evidence corroborated Thomas's account of Shelton's deliberate and premeditated killing of Thorpe. (*Id.* at p. 1086.)

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[3] *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). Under *Brady*, the prosecution may not suppress evidence material to the defendant's guilt or punishment. (*Id.* at p. 87.)

[4] It is unclear from the record whether the prosecutor intends to retry Shelton.

[5] The Ninth Circuit also granted Silva habeas relief based on the prosecutor's secret deal in 2005, several years before Shelton filed his habeas petition. (*Silva v. Brown* (9th Cir. 2005) 416 F.3d 980.) Shelton did not learn of the secret deal until he discovered the Ninth Circuit's decision on Silva's habeas petition in a prison law library. (*Shelton v. Marshall*, *supra*, 796 F.3d at p. 1083.)

In a separate opinion, the Ninth Circuit held evidence of the prosecutor's secret deal with Thomas was not material with respect to Shelton's convictions for the second degree murder of Craig, or the kidnapping and theft convictions. (*Shelton v. Marshall* (9th Cir. 2015) 621 Fed. Appx. 873, 874.) The court found that, even without Thomas's testimony, there was "overwhelming evidence" of Shelton's intentional participation in the kidnapping of Thorpe and Craig. (*Ibid.*) Moreover, Thomas's testimony regarding Craig's death was largely consistent with Shelton's own testimony. (*Id.* at pp. 874–875.) As to the theft convictions, there was evidence Shelton was wearing Thorpe's boots when he turned himself in, his fingerprints were on a car stereo removed from the victim's car, and Shelton acknowledged receiving $100 from Silva the day after the kidnapping. (*Id.* at p. 875.)

E. *The Instant Habeas Petition*

On June 23, 2015, Shelton filed a petition for a writ of habeas corpus, arguing the Governor erred in reversing the Board's decision to grant parole. The trial court granted the writ, finding the Governor's decision was not supported by some evidence Shelton would be a current threat to public safety if released. Citing to the Ninth Circuit's decision, the court also found the Governor had relied on tainted evidence from Thomas, and that evidence could not be used to justify the Governor's decision to overturn the Board. This appeal followed.

II. DISCUSSION

A. *Applicable Law*

The Board is authorized to grant parole and set release dates. (Pen. Code, §§ 3040, 5075 et seq.) It must grant parole to an inmate "unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual." (Pen. Code, § 3041, subd. (b)(1).)

In making this determination, the Board must consider all relevant and reliable information available, including "the circumstances of the prisoner's: social history; past

and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release."[6] (Cal. Code Regs., tit. 15, § 2281, subd. (b).)

Additionally, the Board may consider a prisoner's insight into his or her crimes when determining parole eligibility. "The regulations do not use the term 'insight,' but they direct the Board to consider the inmate's 'past and present attitude toward the crime' ([Cal. Code] Regs., [tit. 15,] § 2402, subd. (b)) and 'the presence of remorse,' expressly including indications that the inmate 'understands the nature and magnitude of the offense' ([Cal. Code] Regs., [tit. 15,] § 2402, subd. (d)(3))." (*In re Shaputis* (2011) 53 Cal.4th 192, 218.) "[E]xpressions of insight and remorse will vary from prisoner to prisoner and . . . there is no special formula for a prisoner to articulate in order to communicate that he or she has gained insight into, and formed a commitment to ending, a previous pattern of violent behavior." (*In re Shaputis* (2008) 44 Cal.4th 1241, 1260, fn. 18.)

If the record is "replete with evidence establishing [a] petitioner's rehabilitation, insight, remorse, and psychological health, and devoid of any evidence supporting a finding that [he or] she continues to pose a threat to public safety," a petitioner's due process rights are violated where the Board relies solely on the "immutable and unchangeable circumstances of [his or] her commitment offense." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1227.)

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[6] There are also a variety of circumstances which tend to show unsuitability for parole, including that the prisoner committed the crime in an especially heinous, atrocious or cruel manner, has a previous record of violence, has an unstable social history, has previously committed sadistic sexual offenses, has a lengthy history of mental problems, and has engaged in serious misconduct while incarcerated. (Cal. Code Regs., tit. 15, § 2281, subd. (c).)

A decision of the Board does not become effective until after a period of 30 days, during which time the Governor may review the decision and affirm, modify, or reverse it. (Cal. Const., art. V, § 8, subd. (b).) The Governor may only affirm, modify, or reverse the decision of the Board on the basis of the same factors the Board is required to consider. (*Ibid.*)

The Board's and the Governor's " 'discretion in parole matters has been described as "great" [citation] and "almost unlimited." ' " (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655.) Our review of the Board's and the Governor's parole decisions is "exceedingly deferential." (*In re Shigemura* (2012) 210 Cal.App.4th 440, 451.) "[W]hen a court reviews a decision of the Board or the Governor, the relevant inquiry is whether *some evidence* supports the decision of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1212, italics added.) "When reviewing a parole unsuitability determination by the Board or the Governor, a court must consider the whole record in the light most favorable to the determination before it, to determine whether it discloses some evidence—a modicum of evidence—supporting the determination that the inmate would pose a danger to the public if released on parole." (*In re Shaputis*, *supra*, 53 Cal.4th at p. 214.)

In sum, "[t]he essential question in deciding whether to grant parole is whether the inmate currently poses a threat to public safety. [¶] . . . That question is posed first to the Board and then to the Governor, who draw their answers from the entire record, including the facts of the offense, the inmate's progress during incarceration, and the insight he or she has achieved into past behavior. [¶] . . . [¶] . . . Judicial review is conducted under the highly deferential 'some evidence' standard. The executive decision of the Board or the Governor is upheld unless it is arbitrary or procedurally flawed. The court reviews the entire record to determine whether a modicum of evidence supports the parole suitability decision. [¶] . . . The reviewing court does not ask whether the inmate is currently dangerous. That question is reserved for the executive branch. Rather, the court considers whether there is a rational nexus between the evidence and the ultimate

determination of current dangerousness. The court is not empowered to reweigh the evidence." (*In re Shaputis*, *supra*, 53 Cal.4th at pp. 220–221.)

B. *Analysis*

The central question presented is whether some evidence supports the Governor's finding that Shelton is currently dangerous and would pose an unreasonable danger to society if released from prison. The Governor's decision was based on his conclusion Shelton lacked insight because he minimized his involvement in the underlying crimes. The trial court found the Governor's denial of parole was an abuse of discretion because the Governor relied on tainted evidence from Thomas, which Shelton was unable to impeach at trial because of Thomas's secret deal with the prosecutor. However, even without Thomas's testimony, there is evidence to support a finding Shelton lacked insight into his crimes. Accordingly, we conclude some evidence supports the Governor's decision.

At the parole hearing, Shelton painted himself as an unwilling participant in the crimes, and stated he acted out of fear for himself and his family. But even the Ninth Circuit, which granted Shelton partial habeas relief based on the tainted evidence from Thomas, rejected Shelton's coercion defense to the kidnapping charges. The court explained: "Nor was there a reasonable probability that, had Thomas been totally impeached, the jury would have accepted a coercion defense to the kidnappings. This defense required a threat of immediate, rather than future, danger to one's life. [Citation.] Shelton had an opportunity to leave when he drove the truck behind the victims' car as well as later that evening when Silva and Thomas left him alone in the cabin with Craig. Shelton testified that he did not try to leave because he feared that Silva would kill him and his family, but this was a threat of future—not immediate—danger." (*Shelton v. Marshall*, *supra*, 621 Fed. Appx. at p. 874.) The Ninth Circuit also noted that Shelton himself testified he stayed with the victims while Thomas and Silva were absent. (*Ibid.*)

Other evidence also suggests Shelton has minimized his role in the kidnappings. Shelton told the Board he learned about the kidnapping plan immediately before Thorpe and Craig were abducted. In contrast, at trial, Shelton admitted to having a discussion

with Silva and Thomas about kidnapping a woman weeks before the actual abduction. Shelton also told the Board there was "no rape," and Thomas had consensual sex with Craig. But after he was arrested in 1981, Shelton told police he had sex with Craig in the cabin, and unlike when Silva and Thomas had sex with her, Shelton's sex acts were not forcible. In the light of the fact Craig was kidnapped and held against her will for days, it is simply unbelievable she had consensual sex with her captors. Shelton's account of Craig's failed escape attempt is also unbelievable. Shelton told the Board he released Craig when "[t]he cocaine guy" visited the cabin, and she either would not leave or she ran across a meadow and a mountain and was caught by Thomas. But it strains credulity to suggest Craig would not try to escape after being kidnapped and raped. Moreover, Shelton's account is inconsistent with his trial testimony, in which he stated Silva, not Thomas, caught Craig. Looking at this evidence in the light most favorable to the Governor's decision, we conclude there was at least some evidence Shelton posed a danger to the public because he has failed to acknowledge his role in the crimes.

Shelton argues whether he committed rape is irrelevant because he was not charged or convicted of that crime. We disagree. In determining whether Shelton poses a current danger, the Governor was entitled to consider if Shelton had insight into his crimes. As discussed, Shelton continues to insist he was an unwilling participant in the charged kidnapping, and he only went along out of fear. This claim is directly contradicted by evidence that Shelton raped Craig. Thus, evidence of the rape also undermines Shelton's claim that he has taken full responsibility for his actions.

We also note the Board, which granted parole, was also concerned Shelton lacked insight. In explaining the Board's decision, one commissioner told Shelton: "[T]his was an absolutely horrific, unconscionable case. And the way that you describe it is hard to swallow as far as, you know, ['']I was just there. I was just a part of it and I was in fear and that's why I went along with this all.['] You've been here for what, 32 years. You've said the same thing over and over again. So for me as a Commissioner, that was very difficult because to me it suggests that you're minimizing your behavior and that you are not taking responsibility for your crime." The Governor expressed similar

concerns, but placed greater weight on Shelton's lack of insight. We are in no position to second-guess the Governor's determination or reweigh the evidence.

Even if the evidence would provide some evidence of future dangerousness, Shelton argues the Governor's decision cannot stand because the Governor failed to consider various factors, including the Elderly Parole Program, which requires special consideration of a prisoner's advanced age, long-term confinement, and diminished physical condition. But the Governor did acknowledge Shelton's age and the length of incarceration. The Governor also indicated he had considered other evidence in the record, including the Board's finding that Shelton was suitable for parole because of his advanced age, along with a variety of other factors. This was sufficient. The Governor was not required to describe in his decision "the exact or relative weight given any particular circumstance." (*In re Stevenson* (2013) 213 Cal.App.4th 841, 862.) "As long as the Governor's decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's decision." (*In re Rosenkrantz, supra,* 29 Cal.4th at p. 677.)

III. DISPOSITION

The trial court's order granting Shelton's petition for a writ of habeas corpus is reversed.

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Margulies, Acting P.J.

We concur:

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Dondero, J.

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Banke, J.

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